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The American Tobacco Company Cases.

It is very seldom that a judge has an opportunity to "get back" at adverse criticism of a decision and to have a chance from the judgment seat to explain and amplify in one case decided almost on the heels of another, his opinion rendered in that one case. This opportunity has been afforded Chief Justice White and the majority of the Supreme Court of the United States in the opinion of the Court in the American Tobacco Company cases. The Court was attacked from many quarters, and criticised in the dissenting opinion of Mr. Justice Harlan for apparently reading into the "anti-trust" statute the word "reasonable." The Chief Justice in the present case denies that the Court has put in or taken anything out of the statute.

> "We took nothing out of this statute by the 'rule of reason,'" said he, "we gave to that statute a vivifying potentiality no honest man may fear." Too literal a construction of the Act, he argues, would have been suicidal to its main purpose and have allowed several of the guilty companies, now brought within the scope of the act, to escape. "If," he continues, "the anti-trust law is applicable to the entire situation here presented and is adequate to afford complete relief for the evils which the United States insists that situation presents, it can only be because that law will be given a more comprehensive application than has been affixed to it in any previous decision. In truth the plain demonstration which this record gives of the injury which would arise from and the promotion of the wrongs which the statute was intended to guard against, which would result from giving to the statute a narrow, unreasoning and unheard of construction, as illustrated by the record before us, if possible serves to strengthen our criticism as to the correctness of the rule of reason, which was applied in the Standard Oil Case, the application of which rule to the statute we now in most unequivocal terms re-express and reaffirm."

The Court goes a bow shot beyond its decision in the Standard Oil Case. That company was allowed to dissolve itself. The American Tobacco Company is to be dissolved by the Circuit Court of Appeals for the Southern District of New York, which is to "recreate," in the language of the Court, "out of the elements now composing it a new condition which shall be honestly in harmony with and not repugnant to the law." It is rather hard to see why this course should not have been pursued with the Standard Oil, which is certainly as great—if not greater—an offender than the Tobacco Company. But the Supreme Court goes even farther than this. It puts the stamp of its disapproval upon the twenty-nine individuals named in the bill filed by the Government as well as upon the companies and already the Government is contemplating criminal prosecution. Justice Harlan dissents in this case for the same reason he so strongly presents in Standard Oil case. We publish in this number that dissenting opinion, as we think it an exceedingly strong one. We shall await with much interest the method the Circuit Court of Appeals will adopt to recreate a new company in harmony with the law, and most heartily concur with Judge Harlan's views on this point.

Surprises of the Law.

We are often tempted with our old friend of the Sabine Farm to exclaim *"pereant qui ante nos nostros dixerunt,"* but never more than in reading an editorial in a late issue of the *New York Times,* especially the latter part thereof. Too long to quote in its entirety, we cannot forbear giving a few extracts. It is anent the New Jersey law forbidding the granting of free passes on transportation companies to every body *but members* of the New Jersey Legislature.

> Gov. Wilson's public utility law went into effect at midnight Sunday amid tremendous applause from all except those to whom the law applies. Beginning yesterday officials and politicians great and small must pay their fares or walk. Nor is this all that is accomplished by this great reform. The Pennsylvania Railway issues notice that all reduced rates in New Jersey are annulled by the law forbidding dis-

crimination. Even clergymen and others accustomed to expect assistance from the railways must pay just like politicians, and at this early date it is impossible to tell where the good work will stop. It includes trolleys as well as steam roads, and for all that anybody can tell it may be an influence worth reckoning in assuring the solvency of corporations whose bankruptcy would cause delight among progressives.

Needless to say, nobody expected such a result, or wanted it. The gloom throughout New Jersey is general, except of course among those who looked out for themselves when they passed this statute, so much like countless others. When Gov. Wilson's tame Legislature passed his law the members excepted themselves from its operation, and on the day that the law directed against everybody else went into effect the railways sent to the Secretary of State transportation for 233 honorables.

Nothing could exceed the surprise with which the railways learned that the anti-trust laws applied to them, unless indeed it was the amazement with which the labor unions learned the same thing. The labor unions promptly began an agitation for an amendment that the anti-trust law should apply only to capitalist corporations, and should not forbid boycotting and other conspiracies by those organizations for human betterment not organized for profit. The railways recognized that they could not hope for any loosening of the laws against them, and they took their ferocious revenge. They ceased issuing inter-State passes, and collected fares, even from United States officials. Uncle Sam was as much surprised as anybody in New Jersey, and words could not express the agony of those who had been accustomed to charge mileage, and ride on "transportation." The farmers were amazed to find that harvest hands could not ride at reduced rates, and that wages were increased by so much. Commercial travelers were as disgusted as Uncle Sam when he found his soldiers' fares raised. When the various orders of railway brotherhoods found that the law meant them there was a flood of bills introduced putting the matter right.

There is no suggestion that a law should be judged solely by the motives of its enactment. A good law may have a bad motive, and a law with a bad motive may have a good effect, as in the case of much recent legislation. But it is not reassuring when a statute does good by accident, or contrary to design, and when the good which it does is sought to be annulled by those amazed to find that the law operates against them. How many of our reform laws

should we have got if every man affected by them had appreciated that the laws included him? We have had enough of laws designed to apply to other people. We need laws to apply to everybody, and when the laws begin to make exceptions they suggest that they are not passed in the interest of everybody, and therefore are of doubtful merit. Gov. Wilson perceives, like many with the reform spirit, that our recent laws are "making business impossible." Much as we may need reform we cannot afford this sort of reform. Only those laws are useful which express the spirit and morality of the community. Laws are harmful equally whether they are too millennial or too bad for enforcement. We have had too many of the latter class, even if sometimes they have been enacted from motives of the other class. Of contentious statutes we have had an excess.

"Laws for all faults,
But laws so countenanced, that the strong statutes
Stand like the forfeits in a barber's shop
As much in mock as mark."

The Deluge of Laws.

And this editorial in the Times but serves to recall the tendency of the present age to make laws. As the Elizabethan Age was peculiarly the age of the Drama, the Age of Anne the period of the Essayist and the Age of Victoria the time of the poets, so future generation will probably classify the twentieth century as the Age of "Laws"—unfortunately, not of law. A writer who has taken some pains to investigate the matter states that we propose in this country of ours one new law for about every one thousand of our population. England with all of her colonies has but one new law proposed for every seventy-seven thousand of her population and England is probably the most law abiding country in the world.

It is calculated that the forty-six states of this Union in the last four years actually enacted—not proposed—nearly 30,000 laws. To what purpose? Are we as a people any more law abiding? Is crime checked to any appreciable degree? Or is it not a fact that the more laws that are enacted the less they are regarded. Take, for instance, the various laws directed against the petty vices of men. How soon they become dead letters.

And those directed against offences which are not in reality criminal of themselves, but made so either for political effect or in a fanatical attempt to regulate society according to certain cut and dried ideas of doctrinaires! Men deliberately seek avenues to avoid them! Employ the most learned and astute counsel to teach them not how to obey, but how to disobey with impunity, and unless supported by strong public sentiment the laws directed at the regulation of petty vices become the laughing stock of a community and weaken the respect—the awe—the reverence which is due to all law as the right rule of human conduct. The great Teacher who taught men that love was the fulfilling of the law well knew that disrespect for any law meant danger to the whole body of the law, when He told his disciples that whosoever shall break one of the least commandments is guilty of them all. For when a man ceases to respect any law, it becomes an easy matter to despise them all. No law amounts to anything unless it be enforced. No law can be enforced which has not behind it a strong public sentiment, and a strong public sentiment to check any vice or crime needs but few and simple laws to direct it.

Original Jurisdiction of the Supreme Court of the United States.

The new State of Oklahoma has begun quite early in its career to test the question of the original jurisdiction of the Supreme Court of the United States. Two suits were brought by that State which were decided on April 3rd, 1911, by the Supreme Court of the United States, both being original bills in equity. The first was by the State against the Atchison, Topeka & Santa Fé Railway Company, in which the original jurisdiction of the Supreme Court was invoked in a suit to enjoin the railway company from charging more than certain specified rates on domestic shipments of lime, cement, plaster, brick, etc., and the Court held that it had no jurisdiction in view of the fact that the State was not engaged in its governmental capacity in the sale or transportation of such commodities and had no proper interest in them. In this case the Southern Kansas Railway Company was authorized to construct its

railway through the Indian Territory, but forbidden to charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind. On the admission of Oklahoma as a territory the State claimed that this law remained in force, despite the fact that the regulations prescribed by the act of Congress were "to exist and be in force only until a State government or governments should exist in said Territory (that is to say, the Indian Territory), within the limits of which the said railway, or a part thereof, shall be located, and then such State government or governments shall be authorized to fix and regulate the costs of transportation of persons and freight within their respective limits by said railway." So, of course, when Oklahoma was organized as a State the act of Congress in this respect necessarily ceased to be of any force in the State and the whole subject of rates in domestic and local business passed under the full control of the State in its corporate capacity, subject, of course, to the fundamental condition that it should authorize only such rates as were legal and not inconsistent with the constitutional rights of the railway company. The Supreme Court therefore held that the question of these rates arose between the shippers and the company, and that the State in its corporate capacity had no interest in the controversy; and that it could never have been in the view of the makers of the constitution that the clause conferring original jurisdiction on this Court "in all cases affecting ambassadors and other public ministers and consuls *and those in which a State is a party*" (art. 3, § 1) intended to include any and every judicial proceeding of whatever nature the State may choose to institute in the Supreme Court of the United States for the purpose of enforcing these laws, although the State had no direct interest in the particular property or rights immediately affected or to be affected by the violation of such laws.

The other case, against the Gulf, Colorado and Santa Fé Railway Company and about a dozen other railway companies and several express companies, was an attempt to invoke the original jurisdiction of the Federal Supreme Court in a civil action to enforce by injunction the penal or criminal legislation of the state against traffic in intoxicating liquors. The Court unani-

mously held that the State could not invoke the original jurisdiction of the Federal Supreme Court by suit on its behalf against persons or corporations of other states where the primary purpose of the suit is to protect its citizens generally against the violation of its laws by the corporations or persons sued. The Court said:

"The words 'in which a state shall be party,' literally construed, would embrace original suits of a civil nature brought by a state in this court to enforce a judgment rendered for a violation of its penal or criminal laws. But it has been adjudged, upon full consideration, that that result was inadmissible under the Constitution. This will appear from an examination of the opinion and judgment in Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 267, 290, 293, 32 L. Ed. 239, 243, 244, 8 Sup. Ct. Rep. 1370. That was an original action brought in this court by the state of Wisconsin against the Pelican Insurance Company of Louisiana, to recover the amount of a judgment rendered in a Wisconsin court against that company for certain penalties incurred by it for violating the laws of that state relating to the business of fire insurance companies. The question was distinctly presented whether the *state* could invoke the original jurisdiction of this court, to enforce the collection of such judgment. It was argued in that case that the suit was simply an action of debt, founded upon a contract of record, to wit, a judgment, and was therefore to be regarded only as a civil suit, as distinguished from a criminal prosecution. But that view was overruled. The court said that notwithstanding the comprehensive words of the Constitution, 'the mere fact that a state is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another state or her citizens.' After an examination of the authorities it was further said, the court speaking by Mr. Justice Gray: The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and *to all judgments for such penalties.* If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment. Wharton, Confl. L., § 833; Westlake, International Law, 1st Ed. § 388; Piggott, Foreign Judgm. 209, 210.' Further: 'From the first organization of

the courts of the United States, nearly a century ago, it has always been assumed that the original jurisdiction of this court over controversies between a state and citizens of another state, or of a foreign country, does not extend to a suit by a state to recover penalties for a breach of her own municipal law. * * * The real nature of the case is not affected by the forms provided by the law of the state for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action, or whether, under that law, a judgment there obtained for the penalty might be enforced by execution, by scire facias or by a new suit. In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end,—the compelling the offender to pay a pecuniary fine by way of punishment for the offense. This court, therefore, can not entertain an original action to compel the defendant to pay to the state of Wisconsin a sum of money in satisfaction of the judgment for that fine. The original jurisdiction of this court is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed (if, indeed, it could impose) any such limit. If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a state in her own courts against a citizen of another state, for the recovery of any sum of money, however small, by way of a fine for any offense, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, the Federal Constitution.' The principles announced in Wisconsin *v.* Pelican Ins. Co. supra, have been recognized in many subsequent cases. (Postal Teleg. Cable Co. *v.* United States). Postal Teleg. Cable Co. *v.* Alabama, 155 U. S. 482, 487, 39 L. Ed. 231, 232, 15 Sup. Ct. Rep. 192; California *v.* Southern P. Co., 157 U. S. 229, 259, 39 L. Ed. 683, 694, 15 Sup. Ct. Rep. 591; Missouri *v.* Illinois, 180 U. S. 208, 232, 45 L. E. 497, 509, 21 Sup. Ct. Rep. 331; Minnesota *v.* Northern Securities Co., 184 U. S. 199, 234, 235, 46 L. Ed. 499, 512, 515, 22 Sup. Ct. Rep. 308; Kansas *v.* Colorado, 206 U. S. 46, 83, 51 L. Ed. 956, 968, 27 Sup. Ct. Rep. 655."

It might be of some interest to note some of the points in which the Court has taken original jurisdiction:

In the case of Kansas *v.* Colorado, 185 U. S. 125, the Court

held that the mere fact that a State had no peculiar interest in a controversy would not defeat the original jurisdiction of the Supreme Court, which might be invoked by the State as parens patriæ, trustee, guardian or representative of all or a considerable portion of its citizens. At first blush this might look as somewhat contradictory to the case of Oklahoma *v.* Western & Gulf Railway Company; but investigation of the two cases will show that such is not the case.

The original jurisdiction has been sustained in a suit of one State against another to enforce the payment of bonds issued by the State, which were assigned by the railway company in whose favor they were issued to another state for the purpose of giving the Supreme Court jurisdiction. South Dakota *v.* North Carolina, 192 U. S. 286.

The original jurisdiction has been further invoked to prevent pollution of watercourses, Missouri *v.* Illinois, 180 U. S. 208; to prevent the unreasonable use of waters of streams, Kansas *v.* Colorado, 206 U. S. 46.

But the main controversies between States have been as to boundaries. Virginia and West Virginia, Missouri and Iowa, Florida and Georgia, Alabama and Georgia, Rhode Island and Massachusetts, Louisiana and Mississippi, Missouri and Illinois, Virginia and Tennessee, Missouri and Nebraska, Iowa and Illinois, Kansas and Colorado, Indiana and Kentucky, Nebraska and Iowa, New Jersey and New York, and Missouri and Kentucky have all sought the aid of the original jurisdiction of this Court in matters affecting the boundaries between them.

Reform in the United States Court's Equity Rules.

Seventy years seems a long time to wait, but the Equity Rules of the United States Courts have waited all that time for any reformation. That they were antiquated, untouched by the vast changes which had been made in all other Courts of Equity, and unreasonably cumbersome, no one denied, but the Court made no sign. The Chief Justice with JJ. Lamar and Vandeventer as a committee will undertake to reshape and reform these rules adopted in 1840, and have had a con-

ference with the President on the subject. Virginia lawyers will recall the President's able address at their Bar Association in 1908 urging reform in judicial procedure especially in the Federal Courts. We have no doubt the new rules will be thorough and up to date. The "touch of the Civil Law" which the Chief Justice will bring into procedure will, we trust, have, to use *his* own language quoted in our first editorial "a vivifying potentiality."

How long, oh! Lord, how long, before Virginia will come to the conclusion that her present procedure is not "the perfection of right reason," and that simplicity and clarity of statement is not impossible in pleading as well as in everything else?